STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2011
v	No. 300824 Ingham Circuit Court
PETERSON TODD HAAK, Defendant-Appellant.	LC No. 08-001091-FH

Before: WILDER, P.J., and TALBOT and SERVITTO JJ.

PER CURIAM.

Peterson Todd Haak appeals after a jury found him guilty, but mentally ill, of aggravated assault,[1] assaulting, resisting or obstructing a police officer,[2] and first-degree home invasion.[3] He was sentenced to serve 365 days in prison with one day credit for aggravated assault, 16 to 24 months for assaulting, resisting or obstructing a police officer, and 36 to 240 months for first degree home invasion to be served concurrently. We affirm.

Haak, a graduate student, broke into a Lansing home and assaulted an elderly couple after a day of heavy drinking. At trial, he argued that he should be found not guilty due to temporary insanity because he involuntarily ingested chloral hydrate the evening he committed the charged offenses. The jury, however, found Haak guilty, but mentally ill, of aggravated assault,[4] assaulting, resisting or obstructing a police officer,[5] and first degree home invasion.[6] After the verdict, Haak moved for a directed verdict of acquittal and/or a new trial, but it was denied.

[1] MCL 750.81a.

[2] MCL 750.81d(1).

[3] MCL 750.110a(2).

[4] MCL 750.81a.

[5] MCL 750.81d(1).

[6] MCL 750.110a(2).

On appeal, Haak argues that the jury's verdict that he was guilty, but mentally ill was not supported by sufficient evidence, as it was proven by a preponderance of the evidence that he was legally insane. We disagree. This Court reviews challenges to the sufficiency of the evidence de novo.[7] The evidence is considered in the "light most favorable to the prosecution [to] determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."[8]

A defendant is guilty, but mentally ill if the jury finds that the defendant is guilty of the offense beyond a reasonable doubt, and despite proving "by a preponderance of the evidence that [he] was mentally ill at the time of the commission of [the] offense," the defendant did not establish that he "lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of [his] conduct or to conform [his] conduct to the requirements of the law."[9] If, however, the defendant proves by a preponderance of the evidence that that he was mentally ill and "lack[ed] substantial capacity either to appreciate the nature and quality or the wrongfulness of [his] conduct or to conform [his] conduct to the requirements of the law," then he will prevail on a defense that he was legally insane.[10]

The evidence supports the jury's finding that Haak could appreciate the nature and quality or the wrongfulness of his conduct or conform his conduct to the requirements of the law and, thus, was guilty but mentally ill and not legally insane.[11] While trichloroethanol was found in Haak's blood, the evidence did not establish that Haak had ingested chloral hydrate. Assuming Haak had ingested chloral hydrate, there was no evidence that it affected his ability to appreciate the nature or wrongfulness of his conduct or conform to the requirements of the law. Haak's toxicology expert, Bernard Eisenga, M.D., testified that chloral hydrate is a sedative that is used primarily for children and has limited use for adults. Eisenga admitted that there were no published studies regarding the adverse effects of chloral hydrate on adults and much of his information regarding its adverse effects was from a study of children ages zero to three years old. Eisenga further testified that chloral hydrate was a depressant that would in most cases enhance the sedative effects of alcohol. While Eisenga opined that Haak was not capable of performing the acts that he was accused of, Eisenga admitted that he only spent a total of approximately 15 minutes with Haak, did not perform a comprehensive examination of him and never observed him while intoxicated.

Based on the evidence, the jury found that while Haak was guilty and mentally ill, he failed to establish that he lacked the substantial capacity to appreciate the nature and quality or the wrongfulness of his conduct or conform his conduct to the requirements of the law when the

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[7] *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007).

[8] *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

[9] MCL 768.36(1).

[10] MCL 768.21a(1).

[11] MCL 768.36(1).

crimes were committed.[12] "In reviewing a sufficiency argument, this Court must not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses."[13] Additionally, because Haak was not legally insane, his assertion that he lacked the requisite intent to commit the charged offenses because of his insanity must fail.

Haak next asserts that the trial court erred in denying his motion for a new trial because it was against the great weight of the evidence. We disagree. "This Court reviews for an abuse of discretion a trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence."[14] "An abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence."[15]

It was not against the clear weight of the evidence for the jury to find that Haak was mentally ill and not legally insane. As explained above, the evidence supports the jury's finding that Haak was guilty, but mentally ill, as he failed to establish that he could not appreciate the nature and quality or the wrongfulness of his conduct or conform his conduct to the requirements of the law.[16] As such, the trial court did not abuse its discretion by denying Haak's motion for a new trial.

Haak also contends that there was insufficient evidence to support his conviction for assaulting, resisting or obstructing the police. We disagree. "[A]n individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony[.]"[17] Obstruct is defined as "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command."[18]

Haak obstructed the police by knowingly failing to comply with their commands. At least two uniformed police officers arrived at the victims' residence in marked patrol cars and established a perimeter around the house. The officers identified themselves as the police and gave verbal commands to Haak to put his hands in the air and get on the ground. Haak did not comply, but responded by telling the officers to put their hands in the air and simulated that he had a gun. After the officers entered the home, they attempted to handcuff Haak and a brief struggle ensued. Once outside of the home, he continued to resist the officers and made it difficult for them to search him for weapons and contraband. The police then had to subdue Haak by using "knee strikes" and by taking him to the ground. This evidence, when viewed in a

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[12] *Id.*

[13] *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000).

[14] *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

[15] *Stiller*, 242 Mich App at 49 (citation omitted).

[16] MCL 768.21a(1).

[17] MCL 750.81d(1).

[18] MCL 750.81d(7)(a).

light most favorable to the prosecution, is sufficient to support Haak's conviction for assaulting, resisting or obstructing the police.[19]

Next, Haak asserts that the he was entitled to a new trial because his constitutional due process rights were violated since there was a compromise verdict. Specifically, Haak argues that the length of deliberations, the verdict itself and alleged prosecutorial misconduct are evidence that a compromise occurred. We disagree. Unpreserved constitutional claims are reviewed for plain error affecting a defendant's substantial rights.[20]

"A fair trial is a right guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[21]

> All members of a criminal jury must agree beyond a reasonable doubt to the same verdict. . . .When jurors give up their beliefs to settle on a common ground with other jurors, who may have also abandoned their convictions in the interest of agreement, a compromise verdict results. When jurors forsake their convictions simply to reach a verdict, the defendant has not been found guilty beyond a reasonable doubt by all members of the jury.[22]

Indicia of a jury compromise include situations "where the jury is presented an erroneous instruction, and: 1) logically irreconcilable verdicts are returned, or 2) there is clear record evidence of unresolved jury confusion, or 3) . . . where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense."[23]

The jury began to deliberate on August 9, 2010, and rendered a verdict on August 10, 2010. The timing of the verdict and the questions asked by the jury during deliberations do not suggest that a compromise occurred. We have found that the verdict that Haak was guilty, but mentally ill was supported by sufficient evidence and was not against the great weight of the evidence. Additionally, as explained below, there was no prosecutorial misconduct that prevented Haak from receiving a fair and impartial trial. Therefore, the evidence does not support that a jury compromise occurred and Haak's due process rights were not violated.

Haak also contends that he was unduly prejudiced when the prosecution failed to provide the written opinions of their pharmacology and toxicology expert, William Atchison, Ph.D., until

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[19] *Wolfe*, 440 Mich at 515-516.

[20] *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009).

[21] *People v Ramsey*, 422 Mich 500, 510; 375 NW2d 297 (1985).

[22] *People v Wallace*, 160 Mich App 1, 11; 408 NW2d 87 (1987).

[23] *People v Graves*, 458 Mich 476, 488; 581 NW2d 229 (1998).

the fourth day of trial. We disagree. We review the trial court's handling of discovery and its decision to admit Atchison's testimony for an abuse of discretion.[24]

Upon request, a party must provide "the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion."[25] If the party fails to comply, the trial court has the discretion to:

> [O]rder the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.[26]

"When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance."[27]

At the end of the second day of trial, defense counsel advised the court that she was still waiting for Atchison's report regarding his testimony. The prosecutor explained that Atchison was a rebuttal witness and that his testimony would be based on the testimony of Haak's experts. When Atchison's preliminary report became available two days later, it was sent to defense counsel, but it was not received until the next day. Haak contends that this resulted in Eisenga having five to ten minutes to review the report before testifying. Any delay by the prosecution, however, was harmless as defense counsel was granted permission to re-call Eisenga as a witness if needed.[28] As such, Haak was not unduly prejudiced by the delay in receiving Atchison's report and the trial court did not abuse its discretion when it refused to preclude his testimony.

Haak further contends that Atchison's testimony was impermissibly admitted at trial because he is not qualified to serve as an expert in pharmacology and toxicology. We disagree.

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of

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[24] MCR 6.201(J); *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007).

[25] MCR 6.201(A)(3).

[26] MCR 6.201(J).

[27] *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002).

[28] *People v Mezy*, 453 Mich 269, 285-286; 551 NW2d 389 (1996).

> reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[29]

Atchison is employed as a professor of pharmacology and toxicology in the college of veterinary medicine at Michigan State University. He obtained his Ph.D. in pharmacology and toxicology from the University of Wisconsin, Madison in 1980. Atchison has performed research in neuropharmacology and neurotoxicity. For over 20 years, he served on various federal advisory boards through the National Institute of Health reviewing research grant proposals from universities requesting federal funding. Some of the grant requests he has reviewed were regarding the effects of alcohol on the human body. Atchison spent eight years on a panel that reviewed the toxicity of environmental agents and alcohol, and published over 70 papers in peer review journals on the effects of toxins on the nervous system. Atchison is familiar with trichloroethanol and that it is a metabolite of several drugs and chemicals, including chloral hydrate and trichloroethylene. Moreover, Haak did not object to Atchison's qualifications at trial. Accordingly, the trial court did not abuse its discretion in determining that Atchison was qualified as an expert in pharmacology and toxicology.

Haak also asserts that Atchison's opinions did not contain sufficient facts or scientific data. We disagree. "The trial court has an obligation under MRE 702 'to ensure that any expert testimony admitted at trial is reliable.'"[30] "Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data."[31] Atchison testified regarding the potential sources of the trichloroethanol that was found in Haak's blood. Atchison opined that an alternative source for the trichloroethanol may have been exposure to trichloroethylene.

Haak argues that Atchison should not have been permitted to testify regarding trichloroethylene because he had not personally performed laboratory research on the compound. Atchison, however, testified that he reviewed research performed by the Environmental Protection Agency and the World Health Organization on trichloroethylene. His research revealed that Michigan was ranked in the top five states in the country to have water contaminated with trichloroethylene.

Haak also argues that Atchison was not qualified to testify that Haak's actions were consistent with someone with a blood alcohol level of .145 to .160. Atchison testified that during his pharmacology training he learned about blood alcohol levels and behavior, and has knowledge of the pharmacology of alcohol. Based on the above, we find that Atchison's testimony contained sufficient facts and scientific data and the trial court did not abuse its discretion when it permitted him to testify.

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[29] MRE 702.

[30] *Dobek*, 274 Mich App at 94 (citation omitted).

[31] *Id.*

Finally, Haak alleges that he was denied a fair trial because of prosecutorial misconduct. We disagree. Haak raised the issues that the prosecution mischaracterized his burden of proof and used an improper demonstration during its rebuttal closing argument in the trial court, so those issues were preserved. This Court reviews preserved issues of prosecutorial misconduct de novo to determine whether Haak was denied a fair and impartial trial.[32] Unpreserved issues of alleged prosecutorial misconduct are reviewed for plain error affecting Haak's substantial rights.[33] "When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context."[34]

First, Haak contends that the prosecutor improperly asserted that the victims needed "justice" and discussed the victims' character during its closing argument. "It is improper for the prosecutor to appeal to the jury to sympathize with the victim,"[35] or to appeal to the jurors "to convict the defendant as part of their civic duty."[36] In this instance, the prosecutor did neither. During its closing argument, after the prosecution reviewed the evidence and recounted the female victim's preliminary examination testimony regarding her assault by Haak, the prosecutor indicated that the victims "cry out for justice." This was not an appeal for the jurors to suspend judgment and convict Haak out of empathy for the victims or as a duty to society. It was instead a request to convict Haak because the evidence established guilt.

Haak has taken the prosecutor's comment regarding "immeasurable" character out of context. We find that the prosecutor's comment that the victims' character was "immeasurable" was not asking the jury to consider their character and feel sympathy for them, but was to emphasize that the victims are worthy of belief.[37]

Second, Haak asserts that the prosecutor improperly offered his personal opinion about his guilt. Specifically, he challenges the prosecutor's use of phrases such as "we know, without a doubt" and "we know without a question" when discussing Haak's commission of the charged offenses. It is improper for prosecutors to express their personal beliefs about a defendant's guilt.[38] When the challenged phrases are read in the context of the prosecutor's closing argument, it is clear that the prosecutor was merely summarizing the undisputed evidence that Haak had engaged in the acts comprising the charged crimes and asserting that it supported a guilty verdict.

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[32] *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

[33] *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

[34] *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

[35] *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988).

[36] *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

[37] See *People v Jones*, 60 Mich App 681, 685-686; 233 NW2d 22 (1975).

[38] *Bahoda*, 448 Mich at 286.

Third, Haak argues that the prosecutor argued facts not in evidence and erroneously asserted that Haak was not tested for GHB or Ketamine at the hospital and did not provide the jury with an accurate summary of what he was tested for. We agree that the evidence shows that Haak was tested for GHB and Ketamine, as well as others. This error, however, was harmless as the evidence of Haak's guilt was overwhelming and his right to a fair trial was not affected.[39]

Fourth, Haak contends that the prosecutor improperly criticized him and defense counsel during closing arguments and asserted that defense counsel attempted to mislead the jury. Prosecutors are not permitted to personally attack defense counsel because "[s]uch an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality."[40] Similarly, a prosecutor may not denigrate a defense by claiming it is a sham.[41] The prosecutor asked the jury to reject any argument that Haak should be excused from culpability in light of the evidence presented. While the prosecutor used the phrase "some fancy elaborate defense" and insinuated that Haak was lying, "[t]his Court has repeatedly declined to find reversible error where the prosecutor argued that the defendant was lying and no objection to this language was made at trial."[42] Also, the prosecutor need not make arguments in the "blandest possible terms."[43]

Fifth, Haak asserts that the prosecutor denigrated the defense experts. Specifically, he contends that the prosecution impermissibly focused on them being paid experts. The challenged comments occurred while the prosecutor described how the jury should evaluate the various experts that had testified at trial. We find that the prosecutor was not personally attacking the integrity of Haak's experts, but was instead asserting how he believed the jury should assess their testimony. We presume the jury followed the court's clear instructions on how to assess expert witness testimony.[44]

Sixth, Haak contends that the prosecutor mischaracterized his burden of proof by referencing a "high hurdle." The prosecutor's reference to a "high hurdle" was not characterizing Haak's burden of proof. Rather, the prosecutor was explaining that Haak must not only establish that he was mentally ill, but also establish that he was unable to conform his behavior or appreciate the nature and quality or wrongfulness of his conduct. Further, we see nothing in the record to overcome the presumption that the jury followed the court's clear instructions on Haak's burden of proof.[45]

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[39] *Mezy*, 453 Mich at 285-286.

[40] *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984).

[41] *Dalessandro*, 165 Mich App at 579-580.

[42] *People v Charles*, 58 Mich App 371, 388; 227 NW2d 348 (1975).

[43] *Dobek*, 274 Mich App at 66.

[44] *Graves*, 458 Mich at 486.

[45] *Id*.

Finally, Haak contends that the prosecutor's demonstration during his rebuttal closing argument was inadmissible because the requirements for the admissibility of demonstrative evidence were not satisfied.[46] Because the demonstration was not an exhibit admitted at trial, and the jury was instructed that it could only consider evidence that was properly admitted when rendering their verdict, it was not necessary that the admissibility requirements be met.[47]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

[46] See generally *People v Castillo*, 230 Mich App 442, 444-445; 584 NW2d 606 (1998).

[47] *Graves*, 458 Mich at 486.